No. 92-631

In The
Supreme Court of the United States
October Term, 1992

Supreme Court, U.S.
FILED
JUN 23 1993
OFFICE OF THE CLERK

Thunder Basin Coal Company,
Petitioner,
v.
Robert B. Reich, Secretary of Labor, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENTS

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Dated: June 23, 1993

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QUESTION PRESENTED FOR REVIEW

Whether the District Court lacked jurisdiction to enjoin the Mine Safety & Health Administration from enforcing its regulations governing the miners' right to designate a representative for purposes of the Federal Mine Safety and Health Act of 1977.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-896

THUNDER BASIN COAL COMPANY,
Petitioner,

v.

ROBERT B. REICH, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The United Mine Workers of America ("UMWA") is a labor organization which represents employees in the coal mining industry. The UMWA was instrumental in seeking passage of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 742 *et seq.* (and its successor the Federal Mine Safety and Health Act of 1977), after 78 coal miners died in a mine explosion in Farmington, West Virginia in 1968. The UMWA, whose motto is "Safety First," has thus demonstrated a long-standing interest in the health and safety

of the nation's coal miners at both union and non-union mines.

In this case, the Petitioner filed a preemptive action in the U.S. District Court to bar MSHA's enforcement of the selection by Petitioner's employees of UMWA Health and Safety representatives as "representative of the miners" for purposes of, among other things, exercising the "walkaround" right authorized by the Federal Mine Safety and Health Act of 1977, 83 Stat. 742, 91 Stat. 1290, 93 Stat. 695, 30 U.S.C. §§ 801-962, *as amended* ("The Mine Act"). 30 U.S.C. § 813(f). In doing so, the Petitioner sought to circumvent the comprehensive review procedures provided by the Mine Act. In holding that the District Court lacked jurisdiction to entertain such an action, the Tenth Circuit, in its opinion below, recognized that such preemptive actions could seriously undermine Congress' intent to provide for the prompt enforcement of the Mine Act. *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 975 (10th Cir. 1992).

The UMWA has a compelling interest in the prompt and unhampered enforcement of the Mine Act. The UMWA believes that the Tenth Circuit was correct in holding that the District Court lacked jurisdiction and believes further that the Tenth Circuit's judgment should be affirmed.

STATEMENT OF THE CASE

Amicus adopts the Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

The Mine Act sets forth a comprehensive scheme of administrative and judicial review which fully and adequately allows a mine operator to litigate all claims it wishes to assert. This review scheme, when considered in light of the Congressional objective of prompt enforcement of the safety and health provisions of the Mine Act, provides clear and convincing evidence of an intent

to preclude a mine operator from making a preemptive strike and filing a preenforcement injunctive action in district court.

To allow a mine operator to file a preenforcement action in district court could seriously hamper enforcement of the Act, particularly since, as recognized by the Tenth Circuit below, it is an easy task to frame a challenge to the application of a regulation under the Mine Act in terms of a statutory conflict or constitutional violation. This case illustrates the Tenth Circuit's warning.

Nothing in the Petitioner's claims warrant deviating from the statutory review procedures. Nothing in the Mine Act requires the Petitioner to waive any rights it claims under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141, *et seq.* 61 Stat. 136, and therefore there is no statutory conflict. Furthermore, the Mine Act provides adequate safeguards, including a meaningful right to request an expedited hearing, and the assessment of penalties only after hearing, to protect Petitioner's constitutional rights, in light of the Congressional concern for prompt enforcement of the Mine Act.

Had Petitioner not chosen to make a preemptive strike, but rather had followed the statutory review procedure, the Review Commission in the first instance, and then the Court of Appeals, would have entertained and considered both of Petitioner's claims. By circumventing the Commission, the parties and the reviewing court were deprived of the aid of the Commission's experience and expertise in construing the walkaround provision. Moreover, the Commission was deprived of the opportunity to interpret the walkaround provision in a manner consistent with rights claimed by Petitioner under the NLRA.

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION TO ENJOIN THE MINE SAFETY & HEALTH ADMINISTRATION FROM ENFORCING ITS REGULATIONS GOVERNING THE MINERS' RIGHT TO DESIGNATE A REPRESENTATIVE FOR PURPOSES OF THE FEDERAL MINE SAFETY & HEALTH ACT OF 1977

A. The Mine Act Sets Forth A Comprehensive Scheme Of Administrative and Judicial Review With The Judicial Review Vested Exclusively In The Court of Appeals

The Petitioner's and Respondents' briefs set out the administrative and judicial review procedures available under the Mine Act and there is no need to repeat them here. These procedures which provide for a citation, abatement, penalties and initial review by an administrative agency and only thereafter by a U.S. Court of Appeals, reflect a congressional interest in prompt enforcement of the mine safety and health laws and, taken as a whole, provide clear and convincing evidence of an intent that district courts not entertain preenforcement actions.

These were the findings made by Judge Gesell in *Bituminous Coal Operators' Association v. Marshall,* 82 F.R.D. 350 (D.D.C. 1979). That case involved the same issue which is the subject of this case. In *Bituminous Coal Operators,* the Mine Safety and Health Administration ("MSHA") issued a bulletin interpreting § 103(f) and its implementing regulations. The Association brought an action seeking injunctive relief against implementation of the bulletin claiming that it was issued in violation of the Admnistrative Procedure Act and was unconstitutional. After making a thorough analysis of the Mine Act's review procedures the Court concluded that under the "clear and convincing" standard of *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), the Court lacked jurisdiction over the preenforcement challenge. Judge Gesell found that the Mine Act, in providing for an unrestricted review of disputes under the Mine Act by the Federal Mine Safety and Health Review Commission and then by a U.S. Court of Appeals, provided two adequate forums for adjudicating all legal claims made by the mine operator, and clearly evidenced an intent to preclude review by a district court. 82 F.R.D. at 353-354.

The Tenth Circuit, in *Thunder Basin Coal Co. v. Martin,* 969 F.2d 970 (10th Cir. 1992), also holding that district courts did not have jurisdiction to hear preenforcement challenges to the Mine Act, cited to Judge Gesell's opinion several times with approval. Similarly, the Tenth Circuit concluded that the procedure providing for review by the Review Commission and a U.S. Court of Appeals revealed that Congress intended to limit district court jurisdiction. The Tenth Circuit found that the Review Commission and U.S. Court of Appeals would entertain constitutional and statutory conflict challenges to the Act so that an operator's interest could be fully and adequtaely litigated.

The Tenth Circuit went on to observe that certain portions of the Mine Act's legislative history lent "special support" to the view that Congress intended to enhance the swift enforcement of the Act by limiting the ability of an operator to invoke the jurisdiction of a district court. *Thunder Basin,* 969 F.2d at 974-975. The Court noted that in enacting the 1977 Mine Act (and thereby amending the 1969 Coal Act), Congress was concerned that the old law did "not provide means to react quickly enough to newly manifested health hazards." *Thunder Basin,* 969 F.2d at 974 (citing S.Rep. No. 181, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N., 3401, 3408). Thus in order to streamline the process and provide for more meaningful enforcement, Congress, among other things, eliminated a mine operator's ability to file a challenge in district court to obtain a *de novo* trial over penalties assessed under the Mine Act. 969

F.2d at 974. The Tenth Circuit noted further that the Senate report, in discussing the grant of jurisdiction given to the U.S. Court of Appeals after review by the Commission, indicated that the intention was that "the penalty litigation should move with no undue delay." 969 F.2d at 974-975.

Thus it is clear from the method of the enforcement scheme, which provides strong incentives for quick compliance, and from relevant portions of the Act's legislative history, that prompt enforcement was a paramount congressional objective in passage of the Mine Act. Yet, as the Tenth Circuit observed, allowing operators to file preenforcement challenges in a district court, based on alleged constitutional and statutory conflict grounds, would undermine that objective and affect safety in the mines. The Tenth Circuit wrote:

> "Permitting district court jurisdiction on the basis of claims of constitutional violations or conflict with other statutes would permit preemptive strikes that could seriously hamper effective enforcement of the Act, disrupting the review scheme Congress intended. Challenges to regulations and provisions under the Mine Act are easily characterized in constitutional terms and as conflicting with other statutes. *See, e.g. Utah Power & Light,* 897 F.2d at 452 (argument that allowing nonemployees walkaround rights under § 813(f) infringes property rights); *United States Steel,* 471 F.Supp. at 439 (plaintiff alleged that complaint involving the Mine Act arose under the Fourth, Fifth, Sixth and Eighth Amendments and Administrative Procedure Act); *Bituminous Coal,* 82 F.R.D. at 352 (plaintiff claimed, *inter alia,* that bulletin giving interpretations of § 813(f) was in violation of 5 U.S.C. § 553 and was unconstitutional)."

969 F.2d at 975.

As a practical matter then, mine operators could seriously hamper enforcement of the Mine Act with little

difficulty by invoking the jurisdiction of the district court under 28 U.S.C. § 1331, particularly since, as the Petitioner argues, all that is required of an operator is for it to frame its complaint to overcome the "so patently without merit" standard of *Bell v. Hood,* 327 U.S. 678, 673 (1946). (Brief of Petitioner at pp. 24-25). Such was not the intent of Congress in creating the enforcement procedures through the Coal and Mine Acts. In passing those Acts, Congress was cognizant that it was regulating an industry whose working conditions were among the most hazardous in the country, and whose operators had been "dragging their feet" when it came to compliance with health and safety standards.[1] Congress thus sought enforcement procedures that would provide incentive for quick compliance with the Act to assure that dangerous conditions would not go uncorrected and mines would become relatively safe places to work. Disrupting enforcement by allowing a district court to insert itself in that process would undermine that Congressional objective.

This case illustrates the danger recognized by the 10th Circuit that operators can easily frame meritless challenges to the Mine Act in terms of constitutional violations or as conflicting with other statutes. Petitioner did just that in this case. As we show below, nothing in Petitioner's claims justifies deviating from the statutory review scheme.

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[1] The Senate Report to the Mine Act, after listing the frequent mine disasters which had occurred since passage of the Coal Act and the Federal Metal and Non-Metallic Mine Safety Act of 1966, P.L. 89-577, stated, "It is unacceptable that years after enactment of these mine safety laws, miners can still go into the mines without even rudimentary training in safety. Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the goverment can bring habitual and chronic violators of the law into compliance." S. Rep. 95-181, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3404.

B. Nothing Petitioner Claims Justifies Deviating From the Statutory Review Scheme

1. *Petitioner Was Never Required to Waive Rights Under the National Labor Relations Act*

The Petitioner attempted to invoke the jurisdiction of the district court by first claiming that there exists in this case a conflict between the NLRA and the Mine Act with respect to the walkaround provision. Petitioner argues that allowing its employees to choose a union health and safety representative to be the representative of the miners under the Mine Act, would require the Petitioner to waive rights it claims to have under the NLRA to exclude non-employee organizers who enter the property for organizing purposes. This claim is specious.

The Petitioner was never required to waive rights under the NLRA. Conversely, the NLRA does not give an employer the right to exclude a non-employee who is exercising his statutorily circumscribed rights as a miner's representative under the Mine Act.

Conceptually, it is helpful to remember that a property owner has certain private property rights emanating from the common law, which generally allow it to exclude anyone it wishes from its property. However, certain federal, state and local laws have carved out limited exceptions to those property rights for limited purposes. Thus, to provide a simple example, a private landowner may be required by statute to allow a repairman from the city water department on his property for the limited purpose of fixing a broken city water line. If, however, the repairman strayed from his repair duties, the landowner would be justified in exercising his property rights and evicting the repairman from the property.

Similarly, both the NLRA and the Mine Act have carved out limited exceptions to property rights. With

respect to the NLRA, in *Lechmere Inc. v. NLRB*, —— U.S. ——, 112 S.Ct. 841 (1992), this Court reaffirmed the holding of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), that there must be an accommodation between the preservation of the employer's common-law private property rights and the employees' right under § 7 of the NLRA "to learn the advantages of self-organization from others." 112 S.Ct. at 845 (quoting from *Babcock & Wilcox*). Thus this Court stated:

> "As a rule, then, an employer cannot be compelled to allow distribution of union literature by non-employee organizers on his property. As with many other rules, however, we recognized an exception. Where 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, . . . 'employers' property rights may be 'required to yield to the extent needed to permit communication of information on the right to organize . . .'" (quoting from Babcock & Wilcox) (citations omitted)

—— U.S. ——, 112 S.Ct. at 846. Thus, an employer may in certain limited circumstances be required to allow access to his property to non-employee union organizers. However, if those circumstances do not exist, *Lechmere* holds that the employee's § 7 rights are unaffected and the employer can exercise his common law private property rights to exclude the non-employee organizer.

The inspection and walkaround provisions of the Mine Act are another limited but separate exception to the owner's private property rights. The Mine Act allows a representative of the Secretary of Labor (usually an MSHA inspector) to make periodic unannounced inspections of mine property to determine compliance with the Act. 30 U.S.C. § 813(a)(1). Furthermore a person chosen by the employees as a representative of the miners is allowed to accompany the MSHA inspector for the

purpose of these periodic inspections. In upholding the constitutionality of these inspections, which do not require a warrant, this Court noted that the mine operator had a diminished expectation of his private property rights in view of Congress' pervasive and defined regulation of an industry "with a notorious history of serious accidents and unhealthful working conditions." *Donovan v. Dewey*, 452 U.S. 594 (1981). As with the other examples of a statutory exception to the owner's property interest, if the miner representative, whether an employee or non-employee, were to go beyond the limited license the Mine Act gives him during a walkaround, the mine owner could assert his private property rights.

This was essentially the response the Tenth Circuit made to the Petitioner's statutory conflict and irreparable injury claims in its opinion below. *Thunder Basin*, 969 F.2d at 976-977. (" . . . if § 813(f) was being abused, an operator's solution would be to 'take action against individual instances of abuse when it discovers them.'" (citing *Utah Power & Light v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990))). This was also the response the Review Commission made to the same argument in *Kerr-McGee Coal Corp. v. Secretary of Labor*, 13 FMSHRC 1889, *aff'd*, WEST, 91-84-R, et al., 15 FMSHRC—(March 4, 1993), petition for review docketed, No. 93-1250 (D.C. Cir. April 1, 1993), cited by the Petitioner.

There, the Review Commission did entertain and consider the identical argument made by Thunder Basin in this case, that allowing UMWA representatives to be "representatives of the miners" amounted to a waiver by Kerr-McGee of rights under the NLRA. The Review Commission considered the NLRA, but found that the Secretary interpreted the walkaround provision of the Mine Act by the circumscribed activity allowed and not merely by the union or non-union status of the representatives chosen by the employees. The Review Commission

did not hold that the mine operator would have to allow a non-employee organizer on the property for the purpose of organizing activity like, for example, that described in *Lechmere* or *Babcock and Wilcox* (handbilling or solicitations to sign union authorization cards). To the contrary, the Review Commission agreed with the Secretary's position that nothing in the Mine Act's walkaround regulations impinge on Kerr-McGee's right under the NLRA to deny access to its property to non-employees engaged in union organizing and made it clear that abuse by a representative of the miners of his rights under the Mine Act could be resolved on an individual rather than a *per se* basis. *Kerr-McGee*, slip op. at 10-11. In *Kerr-McGee*, as here, there was no evidence that those rights had been abused.

Seen in this light, there is no conflict between the NLRA and the Mine Act. Each provides narrow exceptions to the property owners private property interests and no more. If the activity of the non-employee goes beyond the activity prescribed by each Act, then within the narrow circumstances of each Act, the owner can assert his private property right.

This *lack of a conflict* also makes clear that a pre-enforcement action in district court was singularly inappropriate here. Thunder Basin filed its district court complaint after the MSHA inspector merely had ordered it to post the designation by the employees of the UMWA representatives as the representative of the miners on the mine bulletin board pursuant to 30 C.F.R. § 40.4., and the Petitioner had refused. The UMWA representatives never actually exercised the walkaround rights (or any other right) under the Act, and therefore, there is no record at all of compliance with or abuse of those rights.[2]

[2] Although Petitioner has emphasized the walkaround right, as a practical matter, it is unlikely that a miners' representative who is not also an employee will be able to exercise that right with any frequency or regularity. MSHA inspections are unannounced and the non-employee representative would not know when to be at the

Furthermore because of the district court's exercise of jurisdiction and issuance of an injunction, the Review Commission was unable to review the case, call upon its expertise in dealing with the walkaround provision of the Act, and issue an interpretation of the walkaround provision which contemplates no conflict with the Petitioner's property rights as it pertains to the NLRA.[3]

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mine. For that reason, employee alternates are also designated. The non-employee representative's presence at the mine, therefore, may wind up being limited to those situations when a particular hazard has been reported, or an accident has occurred.

It would also not be surprising of the non-employee safety expert was called upon when it came to exercising the right of the miners' representative to review the various mining plans required to be submitted by a mine operator to MSHA. This Court has recognized that mining operations are "unique," "complex," and "hazardous," *Donovan v. Dewey*, 452 U.S. at 603, n.8, so that expertise in reading and comprehending mine plans would be critical.

[3] Although we need go no further with this argument, we note that Petitioner and the Amici, American Mining Congress and National Coal Association, mistakenly argue that the NLRA "provided the employer with the basic right . . . to exclude non-employee union organizers from his property." (citing *Lechmere* and *Babcock and Wilcox*) (Petitioner's brief at p. 26) As we have shown above, Petitioner's right to exclude non-employee union representatives emanates from the common law rather than any provision of the NLRA. In this context the NLRA does not provide the employer with any rights. It only provides rights to the employees under § 7 to organize and receive information.

This is made clear when one considers that an employer has no federal forum to initiate exclusion of non-employee organizers and must bring a common law action for trespass in state court to exercise his property right to evict such persons. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978). Furthermore, under the "well pleaded complaint rule" the employer could not base federal question jurisdiction on the non-employee organizer's anticipated § 7 defense. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974).

This calls into question whether Petitioner can assert a statutory conflict claim on which subject matter jurisdiction under 28 U.S.C. § 1331 can be based. Petitioner has asserted that under the authority of *Traynor v. Turnage*, 485 U.S. 535 (1988), *Oestereich v.*

2. *Compliance with the Mine Act's Statutory Review Did Not Pose a Due Process Problem*

a. *Petitioner Would Not Have Suffered Irreparable Harm If It Had Refused To Comply With MSHA's Enforcement Action While Availing Itself Of Statutory Review Procedures*

Petitioner's due process challenge to the Mine Act's review procedures themselves is equally without merit because Petitioner has failed to show that it would have suffered irreparable harm if it had first refused to comply with MSHA's enforcement order to post the designation and then availed itself of the review procedures. The Mine Act's review procdures provide adequate safeguards to minimize the harm to the operator pending review by the Commission.

When the Petitioner refused to post the designation the MSHA inspector could have first issued a citation, and if Petitioner's refusal continued, the inspector could have issued a "withdrawal" order under § 104(b) of the Mine Act. 30 U.S.C. § 814(b). As in *Kerr-McGee*, however, that order would not have affected any area of the mine and production of coal would have gone on uninterrupted.

Although the Act provides for civil penalties, including daily penalties for continued non-compliance, as the Tenth Circuit noted, if the operator contests the citation and order before the Commission, such penalties are not assessed until after a full hearing. Furthermore, the Com-

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Selective Serv. Sys. Local Bd., 393 U.S. 233 (1968), and *Leedom v. Kyne*, 358 U.S. 184 (1958), the district court has jurisdiction of a suit to prevent an administrative agency from depriving persons of a "'right' assured them by Congress." (quoting from *Leedom v. Kyne*, 358 U.S. at 189). In each of those cases the Plaintiff asserted certain explicit rights granted to him by Congress. Here, it is not a right provided by Congress of which Petitioner claims it has been deprived.

mission is not bound by MSHA's proposed penalty but can assess a higher or lower one depending upon the facts and circumstances of the case.

Moreover, a document in the Joint Appendix indicates that MSHA probably would not have proposed a daily penalty against Thunder Basin had the operator requested an expedited hearing under the Mine Act to quickly litigate its challenge. Page 36 of the Joint Appendix, which was Exhibit 12 attached to the Petitioner's original district court complaint, is an internal MSHA memorandum from the sub-district manager to the district manager concerning another operator, Kerr-McGee's, refusal to post the notice regarding the miners' representatives. That memorandum indicates that MSHA advised the operator that the daily nonabatement penalty would probably not be imposed if the operator initiated a request for an expedited hearing before the Review Commission. Furthermore, the actual proposal for the daily penalty did not take place until over two months after the citation and order were issued, during which time no expedited hearing was requested. (See pp. 42-43 of Joint Appendix, Exhibit 15 to Petitioner's district court complaint, letter dated January 2, 1991 from the MSHA to Kerr-McGee Coal Corp. noting the citation dated October 24, 1990 and indicating that a daily civil penalty would be recommended if the operator did not comply.)

As the above-referenced documents reveal and as the Tenth Circuit pointed out in its opinion, the Petitioner could have availed itself of the expedited hearing procedures set out at 29 C.F.R. § 2700.52 had a citation and order been issued. 969 F.2d at 976. That section provides for a hearing on the merits of the case with 4 days notice or even less if the parties consent. Moreover § 105 (b) of the Mine Act allows an operator to request temporary relief from the withdrawal order which would remove the threat of daily penalties. 30 U.S.C. § 815(b). (The requirements for temporary relief from a withdrawal

order are very similar to the requirements for an injunction in federal district court. (§§ 2700.46-2700.47)).[4]

These expedited hearing procedures have been effectively used in the past by mine operators. For example, in *Clinchfield Coal Company v. Secretary of Labor,* 11 FMSHRC 2120 (1989), the operator obtained a hearing before an Administrative Law Judge six days after issuance of the withdrawal order and an order vacating the withdrawal order 21 days after the close of the hearing. The five-member Review Commission heard the appeal on an expedited briefing and argument schedule and issued its opinion 10 weeks later. In *Southern Ohio Coal Company v. Secretary of Labor,* 13 FMSHRC 1149 (1991) a mine operator was able to obtain an expedited hearing 8 days after filing its motion to expedite. The judge issued a written opinion 8 days later.

Thus, on their face and as implemented by MSHA, for those mine operators who choose not to abate the violation, the review procedures under the Act provide ample safeguards to protect the rights of the mine operator while it litigates disputes under the Act.[5]

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[4] The hearing procedures allow for discovery in ways similar to those under the Federal Rules of Civil Procedure, including the taking of depositions and the requesting of documents. The procedures allow the ALJ to shorten the time for responses and to set the time and place of depositions, if the parties cannot agree. This would allow a mine operator a method of obtaining discovery even if it were to request an expedited hearing.

[5] We note also that, although Petitioner has argued that it could be assessed a civil penalty of up to $50,000 as evidence of the irreparable harm it could suffer, (Petitioner's brief at p. 5) in *Kerr-McGee* the ALJ assessed a civil penalty of only $300, 13 FMSHRC at 1906, which the Commission affirmed.

b. ***Petitioner Would Not Have Suffered Irreparable Harm If It Had Chosen To Comply With MSHA's Interpretation While Availing Itself Of The Statutory Review Procedures.***

The Petitioner also argues that if it had chosen to comply with MSHA's interpretation by posting the designation and then litigating its dispute under the Act's review procedures, it would have been irreparably harmed because it would have been forced to waive its rights under the NLRA. As we have shown above, however, compliance with the Mine Act would not have forced Petitioner to waive rights it claims under the NLRA. Walkaround rights are narrowly circumscribed by the Mine Act and are not a license to allow a non-employee to run rampant around the mine operator's property to distribute union literature or solicit authorization cards. The mine operator retains the right to contest the designation of any non-employee representative of the miners who engages in activity other than what is allowed under the Mine Act.[6]

In this case, the only operative facts that had occurred prior to the Petitioner's filing of its district court complaint was its refusal to post the designation. Such posting could hardly amount to irreparable harm. Furthermore, as we noted earlier, as a practical matter, the non-employee UMWA representatives would have had a difficult time personally exercising the walkaround rights. The annual four or more periodic inspections required by the Act are performed without advance notice so that the non-employee could not plan on being at the mine on any particular day.

The assertion that the mine operator would be irreparably harmed by the non-employee miner representative's

[6] We note that the mine operator also has the right to designate a representative to travel with the mine inspector during inspections of the mine. 30 U.S.C. § 813(f). Thus the operator, as well as the MSHA inspector, would witness any abuse by a miners' representative of his walkaround rights that could conceivably occur.

right to review mine books and records during the walkaround is also without merit. The miners' representative would obviously only be able to review what the MSHA inspector could review. Furthermore, in the *Kerr-McGee* case the ALJ found that the only non-public record which the miner representative would have been able to review was certain training records. The ALJ concluded, "[t]he other documents that would be accessible to a miners' representative are accessible to the general public, and the miners' representative thus does not see anything that he could not otherwise see or review." 13 FMSHRC at 1901.

The argument made by the Petitioner and the Amici that the Petitioner will somehow be irreparably harmed because the UMWA representatives who were chosen by the employees to be miners representatives to help promote mine safety will enjoy enhanced status because of the role, is speculative, without merit and in contravention of the clear objectives of the Mine Act. If the miners' representative, whoever he or she is, aids in keeping the conditions at the mine safe and healthy, then the intent of Congress is being carried out. There is certainly nothing in the NLRA which would suggest that its provisions should supersede the safety objectives of the Mine Act.

Finally, the assertion that complying with the employees' selection would subject the Petitioner to an unfair labor practice under the NLRA, if the employees were represented by a union for bargining purposes, is entirely speculative and without merit. The Petitioner has emphatically made clear that it "has never recognized any union as a representative of its employees under the NLRA." (Petitioner's brief at pp. 2-3). Furthermore, the Mine Act does not confer any bargaining rights, as that term is used in NLRA, on a representative of the miners.[7]

[7] The legislative history of the 1969 Coal Act noted that "as used here and throughout the act, the term 'representative of the miners'

For all the foregoing Petitioner would not suffer irreparable harm whether he chose to comply with MSHA's order, or chose not to comply and contest the validity of the order by way of expedited hearing.[8]

C. The Miners Will Suffer Irreparable Harm If An Operator Is Allowed To Circumvent The Statutory Review Procedure

Petitioner repeatedly mischaracterizes the selection of the UMWA representatives by Petitioner's own employees as representative of the miners as "MSHA's UMWA Designation." As the statute and regulations set out, miners' representatives are chosen by employees of the operator. 30 C.F.R. Part 40. In this case, miners were prevented by the district court from selecting representatives of their own choice simply because of those persons' union affiliation. Again, there was no evidence that the chosen representatives had abused their walkaround rights because at the time of the district court's injunction the

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includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws." H.R. Conf. Rep. No. 91-761, 91st Cong., 1st Sess. (1969) *reprinted in* 1969 U.S.C.C.A.N. 2578, 2582.

[8] Amici NCA and AMC suggest that a miners' representative may abuse other rights it has under the Mine Act, particularly under § 101(c) of the Act. 30 U.S.C. § 811(c). At page 15, note 18 of their brief, the NCA and AMC state that the miner representative can intervene in proceedings in which the mine oprator is seeking to obtain a modification of a mandatory health and safety standard under § 101(c) of the Act and cause delay. We point out that under § 101(c) any "interested party" may request a hearing on the operator's petition to modify, and not just the miners' representative. Furthermore, the case cited by the Amici involved the modification of a mandatory safety standard, (the use of air coursed over a conveyer belt full of coal to ventilate areas where miners are working) which is unique because it has been one of the most contentious and controversial issues before MSHA in recent years, spawning much litigation, and the creation of a Belt Air Advisory Commission. 56 Fed. Reg. 27034 (June 12, 1991).

designation had not been posted and the rights had not been exercised.

In the *Utah Power & Light Co. v. Secretary of Labor,* 897 F.2d 447 (10th Cir. 1990), the Tenth Circuit found that a non-employee designated as the miner representative could enhance the safety at the mine because of his expertise in the field of mine health and safety. In *UP&L* the Court noted:

> "Miners may benefit in a number of ways from non-employee representatives participating in walkarounds. For instance, the ALJ in this case found that Rabbitt had held virtually every job in a coal mine and had received special training in health and safety matters, including seminars sponsored by the MSHA that are given to federal inspectors. Furthermore, Rabbitt had investigated "accidents, disasters, fires, and explosions" in various mines. *Emery Mining Corp.,* 8 FMSHRC at 1186. These findings illustrate that a non-employee representative may have greater expertise in health and safety matters than an employee representative.
>
> In addition, if a non-employee representative has inspected other mines, his knowledge of those mines may increase his ability to spot problems and to suggest solutions in the mines under consideration. Furthermore, a non-employee representative is not subject to the same pressures that can be exerted by an operator on an employee representative. Therefore, the underlining purposes of § 103(f), and the Act in general, can be furthered by allowing both employees and non-employees to act as miners' representatives for walkaround purposes."

897 F.2d at 452.

In *Kerr-McGee* the Commission reaffirmed the Tenth Circuit's observation that non-employee miners' representatives could enhance the purpose behind § 103(f) because of their greater expertise. As we noted, above, this Court has recognized that mining operations are uniquely com-

plex and hazardous. *Donovan v. Dewey*, 452 U.S. at 603, n. 8. Mining expertise such as that possessed by UMWA representatives would be an important asset. Thus if anyone has suffered irreparable harm it would be the miners at Petitioner's mine. Because Petitioner was allowed to circumvent the statutory review procedure the miners have had to do without the expertise of the non-employee miners' representative and this could only have an adverse effect on safety at the mine.[9]

D. Circumventing the Statutory Review Scheme Deprived the Review Commission of an Opportunity to Apply Its Expertise

As the Tenth Circuit found, Petitioner could have asserted its constitutional and statutory conflict claims in a proceeding before the Review Commission. When Congress established the Commission as an independent adjudicatory body, it intended that the Commission would "develop a uniform and comprehensive interpretation of the law" in order to provide "guidance to the Secretary in enforcing the Act, and to the mining industry and miners in appreciating their responsibilities under the law."[10] Allowing mine operators to circumvent the statu-

[9] In *Bituminous Coal Operators*, Judge Gesell, in the context of determining whether daily civil penalties would be assessed, stated that § 103(f) was not normally vital to human health and safety. 82 F.R.D. at 354. Judge Gesell was no doubt comparing an operator's failure to abide by § 103(f) with a failure to abide by a provision which could create an imminent danger, for example, the over-accumulation of methane which could cause an explosion. As we have shown, given the considerable expertise of the UMWA representative, and the complexity of mining, it cannot be said that a § 103(f) designation and the exercise of rights thereunder is not essential to the promotion of health and safety in a mine.

[10] Nomination hearing, members of the Federal Mine Safety and Health Committee on Human Resources, 95th Cong., 2d Sess. (1978), Quoted in Coal Law & Regulation Vol. 1 Mine Safety and Health (1990), Timothy M. Biddle, Crowell & Moring, Washington, D.C.

tory review scheme deprives the Commission of the opportunity to apply its expertise and thwarts Congressional intent.

The Commission, on several occasions, has addressed constitutional issues that have arisen under the Mine Act. For example, in *Kenny Richardson*, 3 FMSHRC 8 (1981), a case cited by the Tenth Circuit, the Commission construed its authority to allow it to determine the constitutionality of the statute's criminal penalty provisions.[11] Thus the willingness of the Commission to address constitutional concerns is consistent with its statutory obligation to interpret the Mine Act.

The Amici NCA and AMC incorrectly read *Kaiser Coal Corporation v. Secretary of Labor*, 10 FMSHRC 1165 (1988), as standing for the proposition that the Commission will not consider constitutional challenges to provisions of the Mine Act. (Amici brief at 14-15.) They argue that the Commission's description of § 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1), in *Kaiser* as procedural somehow undermined the Commission's reliance on that provision in the *Kenny Richardson* case. In *Kaiser*, however, the Commission merely rejected the mine operator's efforts to use language in § 113(d)(1) as a basis for bringing an action (for declaratory relief) in a

[11] *Kenny Richardson*, 3 FMSHRC 8 (1981), *aff'd sub nom. Richardson v. Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983); *see, also Gooslin v. Kentucky Carbon Corp.*, 3 FMSHRC 1707 (1981) (holding Commission's Rule 44 in violation of Fifth Amendment); *New York Dep't of Transp.*, 2 FMSHRC 1765 (1980) (ALJ Laurenson) (holding that application of the 1977 Act against state does not violate the Tenth Amendment); *see also Alabama By-Products Corp.*, 4 FMSHRC 2128 (1982) (holding that the Commission has jurisdiction to decide the constitutionality of provision of the 1977 Act and safety standards adopted under it); *Peabody Coal Co.*, 6 FMSHRC 183 (1984) (holding that search warrant under Fourth Amendment was not required by special investigator or records required to be kept by 1977 Act).

manner not otherwise authorized by the Mine Act. In discussing the effect of § 113(d)(1) the Commission stated that:

> ". . . this language describes the *scope* of the judge's [i.e., ALJ] authority to hear and decide matters in those proceedings otherwise properly filed pursuant to the Act." (emphasis supplied)

10 FMSHRC at 1169-1170. This makes clear that *Kaiser* is not a repudiation of *Kenny Richardson,* but rather a reaffirmation of it, since in the latter case the Commission held that under § 113(d)(1) the scope of the ALJ's and the Commission's authority would include the consideration of constitutional issues.[12]

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[12] In *Kaiser,* the operator had been given a citation for violation of a mandatory safety standard which it settled prior to hearing. As part of the settlement agreement Kaiser agreed to comply with certain conditions imposed by MSHA.

Simultaneously, Kaiser's petition for modification of the same mandatory safety standard for which they had been cited, was being considered by MSHA. MSHA granted the petition with certain conditions. Pursuant to § 101(d) of the Act, 30 U.S.C. § 811(d) which allows the miners' representative (or "other interested party"), to request a review, the UMWA requested review of the modification given to Kaiser and a hearing before an administrative law judge was scheduled. The UMWA moved for a continuance of the proceeding, without objection by Kaiser, and the ALJ continued the hearing indefinitely.

Rather than continuing to proceed under the petition for modification procedure, Kaiser filed with the Commission a pleading entitled "application for declaratory relief" in which it sought an order declaring the mandatory standard inapplicable to its mine. The ALJ determined, based on the Administrative Procedure Act, 5 U.S.C. § 554(e) and the Mine Act's § 113(d), that he had jurisdiction to hear Kaiser's application. 10 FMSHRC at 1169. On review, the Commission determined that the ALJ did not have jurisdiction to consider the application based on § 113(d) of the Mine Act. In so holding the Commission declined to permit Kaiser an avenue to circumvent the statutorily established procedures for invoking Commission jurisdiction:

> "Here, Kaiser chose to settle and to withdraw the prior section 105(d) contest proceeding in which the applicability of [belt air standard] . . . was at issue. Afterward, absent any extant enforcement action by the Secretary, Kaiser filed the present independent application for declaratory relief. Although the Commission had unquestioned jurisdiction over the prior contest proceeding, it is without jurisdiction over this application for declaratory relief."

10 FMSHRC at 1171.

Importantly the Commission did declare that it has authority under the § 105(d) enforcement proceedings to grant declaratory relief and that such relief was implicit in 105(d) for it authorized the Commission to "affirm, modify, or vacate the contested citation, order, or proposed penalty or direct 'other appropriate relief' ". 10 FMSHRC at 1171.

[13] *Cyprus Empire Corp. v. Secretary,* 15 FMSHRC 10 (1993) (Striking workers are not "miners" under the Mine Act's walk-

Petitioner contends that since it raises a constitutional issue, the Commission's expertise is irrelevant. This contention, however, ignores the fact that disputes such as this are contextual and cannot be decided in a vacuum without reference to the rights of the miners' representative (including the walkaround right) and their effect on promoting the health and safety of the employees who selected them. In *Bituminous Coal Operators v. Marshall,* 82 F.R.D. 350, (D.D.C. 1979) Judge Gesell, in dealing with a challenge to an interpretation of the walkaround provision stated:

> "Most of the issues raised in the instant action are typical of the questions which Congress wished the Commission to decide in the first instance. Moreover, as tendered here, they could be more effectively considered in light of some concrete factual circumstances . . ."

82 F.R.D. at 354. The Commission has a long history of considering cases dealing with the rights of miners' representatives, and the walkaround right is one which has been a source of frequent litigation and a subject to which the Commission has devoted a considerable amount of thought.[13]

By going directly to District Court to determine an issue that is within the Commission's expertise and has shown the ability to address, Thunder Basin circumvents the statutory procedure enacted by Congress to resolve these issues and deprives the Appellate Courts of the benefit of the Commission's expertise and analysis. This could subject the Secretary and the members of the mining community to the possibility of differing interpretations of the Mine Act by lower courts, thereby gutting Congress' intent to have one agency with the expertise adopt a uniform and comprehensive interpretation of the law.

Contrary to the impression created by the Petitioner and amici AMC and NCA, the Commission has not refused to consider any statute but the Mine Act. Indeed, in the course of deciding cases under the Mine Act, the Commission has frequently referred to other statutes for direction in consideration of similar issues under the Mine Act. For instance, in one of its early cases construing the scope of a miner's right to report hazards without suffering retaliation, (see, 30 U.S.C. § 815(c)),

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around provision and are not entitled to have a walkaround representative accompanying a MSHA inspector); *Emery Mining*, 10 FMSHRC 276 (1988), affirmed *sub nom, Utah Power & Light v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) (Miners can designate a non-employee to be their representative under the Act); *Council of Southern Mountains, Inc. v. Martin County Coal Corp.*, 8 FMSHRC 206 (1984), affirmed *sub nom, Council of Southern Mountains, Inc. v. Federal Mine Safety & Health Review Commission*, 751 F.2d 1481 (D.C. Cir. 1985) (Section 103(f) of the Mine Act does not confer right on non-employee miners' representative to monitor training courses given at mine); *Magma Copper Co.*, 1 FMSHRC 1948 (1979) *affirmed in part, Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), *cert. denied*, 454 U.S. 940 (1981). (More than one representative of the miners (who are employees) must be paid if an inspection consists of two or more MSHA inspectors going to different areas of the mine at the same time); *Kentland Elkhorn Coal Corp.*, 1 FMSHRC 1833 (1979) (Walkaround right limited to quarterly inspection of the entire mine) *reversed, United Mine Workers of America v. FMSHRC*, 671 F.2d 615 (D.C. Cir. 1982) *cert. denied*, 459 U.S. 927 (1982).

the Commission looked at employment discrimination law under Title VII of the Civil Rights Act of 1964 on the issue of how much weight to accord an arbitrator's finding; and they looked at constitutional and labor law cases for guidance in determining how to allocate burdens of proof in the mixed motive situation. *Secretary of Labor on behalf of David Parula v. Consolidation Coal Company*, 2 FMSHRC 2786 (1980).

More recently, the Commission had occasion to consider whether striking miners could designate a walkaround representative. The Commission conceded that "for purposes of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1988) (NLRA), the strikers in this case were 'employees' of the [Operator] at the time of the inspection." The Commission ultimately determined, however, that the strikers did not meet the definition of miner contained in the Mine Act. *Cyprus Empire Corporation v. Secretary of Labor and United Mine Workers of America*, 15 FMSHRC 10 (1993).

Finally in *Kerr-McGee*, in which the operator asserted the same statutory conflict issue posited here, the Commission did not, as Petitioner suggests, ignore the NLRA in reaching its decision. The Commission did consider the Petitioner's NLRA argument, but once considered, rejected it and refused to defer to the NLRA or incorporate its provision into the Mine Act. Rather it interpreted the Mine Act so as to avoid any such conflict. *Kerr-McGee*, slip op. at 11-12.

CONCLUSION

The Mine Act's review provisions provide for a full and adequate hearing of Petitioner's claims in this case and evidence an intent, consistent with Congress' desire for prompt enforcement of the Act, to preclude preemptive strikes in district court even on constitutional and statutory conflict grounds. For all of the foregoing the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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Dated: June 23, 1993

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